UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE, PITTSBURGH DISTRICT

and

Case 6-CA-34608

AMERICAN POSTAL WORKERS UNION, PITTSBURGH METRO AREA POSTAL WORKERS UNION (PMAPWU), AFL—CIO

Patricia J. Daum, Esq., for the General Counsel.

Arthur S. Kramer, Esq., of Philadelphia, Pennsylvania, for the Respondent.

Desmond J. Neurohr, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on May 4, 2006. The charge was filed April 4, 2005,¹ and an amended charge was filed on January 26, 2006. The complaint was issued January 30, 2006.

The amended complaint alleges that the Employer refused to provide timely notice of the subject matter of investigative interviews that it conducted with bargaining unit members and refused to allow those members to meet and meaningfully confer with their union representative before those interviews were held. It is alleged that these actions violated Section 8(a)(1) of the Act. The Employer filed an answer denying the material allegations of the amended complaint. It also filed a Motion for Summary Judgment, requesting that the Board defer this matter to the parties' grievance arbitration process. The General Counsel filed an opposition to this motion. On April 25, 2006, the Board denied the motion without prejudice to the Employer's right to renew its deferral request before me. The Employer has renewed this request for deferral to arbitration.

As described in detail in the decision that follows, I conclude that the Employer unlawfully denied the union representative's requests for information regarding the subject

¹ All dates are in 2005 unless otherwise indicated.

matter of investigative interviews with bargaining unit members prior to conducting those interviews. Having denied the representative this information, it follows that the Employer refused to allow that representative to meaningfully confer with the bargaining unit employees before subjecting them to the investigatory interviews. These actions were in violation of Section 8(a)(1) of the Act. I further conclude that it is not appropriate to defer resolution of this matter to the parties' grievance arbitration process.

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On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Employer, I make the following

Findings of Fact

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I. Jurisdiction

The Respondent, the United States Postal Service, provides postal services for the United States of America and operates numerous facilities throughout the United States in the performance of that function, including the facility located in Greentree, Pennsylvania that is involved in this proceeding. The Respondent admits,³ and I find, that the Board has jurisdiction of this matter pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 1209. The Respondent also admits,⁴ and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act and within the meaning of the Postal Reorganization Act.

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II. Alleged Unfair Labor Practices

A. The Background

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The Postal Service's Greentree Station supervises the operations of six finance stations. These are small facilities that provide customer services to postal patrons. Finance stations do not have supervisory personnel located on their premises. Instead, their routine management is provided by a lead bargaining unit employee. Although formally titled as lead sales and service associates, the parties referred to such employees by their former denomination as "T-6's." The T-6's have a variety of responsibilities beyond those of the ordinary clerks. These include being the custodians for cash and stamp stock issued to the clerks, closing the facility at the end of the workday, notifying supervisors of staffing and scheduling problems, initial handling of customer service issues, and providing access for other clerks to the computerized Point of Sale system (POS). POS access is necessary to enable postal clerks to perform their customer service functions. The T-6's receive additional compensation reflecting their increased responsibilities involved in the performance of these duties.⁵

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One of Greentree Station's finance facilities is the Crafton Finance Office. That office employs three clerks and a T-6, Floyd Johnson. Johnson has been employed by the Postal

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² There are a small number of errors in the trial transcript. At p. 15, l. 17, the reference is to Administrative Law Judge Keltner Locke. At p. 27, l. 14, the word "my" should be "by." At p. 102, ll. 18-20, counsel for the Employer actually said, "[i]t is a matter of law, it is not a matter of the union had to agree to it or not agree to it, management had to agree to it or not agree to it. It is the law." Any remaining errors are not significant or material.

³ See, Respondent's answer to the complaint, par. 2(b). (GC Exh. 1(f).)

⁴ See, Respondent's answer to the complaint, par. 3. (GC Exh. 1(f).)

⁵ Much of this description is taken from counsel for the Employer's position letter dated July 26, 2005. (GC Exh. 7.) The testimony of all the witnesses corroborated this information.

Service for 27 years and has worked at Crafton for the past 7 years. He is a bargaining unit member. He does not work on Saturdays. On those days, Denise Talmadge acts as the T-6 lead associate at Crafton. She has worked for the Postal Service for 21 years and, with one interruption, has been assigned to Crafton since 1993. She is also a bargaining unit member.

The Crafton Office is supervised by Dennis Melko, who is located at the Greentree Station. He has been employed at the Postal Service for approximately 18 years, having served as a clerk and postal police officer. In September 2004, he was promoted to a supervisory position. From that time until January 2005, he received training through the associate supervisors program. In turn, Melko is supervised by Jim Chesney, the manager of Greentree. Among Melko's duties is the conducting of predisciplinary interviews (PDI's), investigative interviews of bargaining unit employees. The purpose of a PDI is to aid in the determination of whether to discipline an employee.⁶

The American Postal Workers Union is the collective-bargaining representative for clerks employed at the Crafton Office. At the time of the events at issue, the Union did not have a steward located at Crafton. As a consequence, the Union and the Employer developed a practice regarding the conduct of PDI's at the facility. When management decided to conduct such an interview, the supervisory official telephoned the Union directly to arrange for the presence of a union representative at Crafton in order to represent the employee at the interview. During this telephone call, the parties selected the date and time for the PDI.

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Since 1994, Desmond Neurohr has been the secretary/treasurer of the Union.⁷ He also serves as a steward and arbitration advocate for bargaining unit members. In this capacity, he has acted as union representative during PDI's conducted at Crafton.

B. The Incidents at Issue

The chain of events involved in this case began when a problem developed at the Crafton Office on a Saturday in March.⁸ In order to assure that Crafton was fully staffed on that Saturday, management at Greentree assigned a clerk, Paulette Wade, to work at the facility. Ordinarily, upon notification from management, Johnson, the Crafton T-6, would be responsible for making the preparations needed so that the clerk would have the cash and stock necessary to perform her customer service functions. These preparatory steps would be taken during the work week prior to the Saturday shift.

On this particular Saturday, when Wade reported to Crafton, she found that no provision had been made to afford her access to cash and stock. In addition, she was unable to log on to the POS computer system, another essential requirement for the performance of her duties. Customarily in such a circumstance, Talmadge, the acting T-6 on Saturdays, would be expected to input the computer with the necessary information to grant access to Wade. On the day in question, Talmadge was unable to accomplish this task. Because of the failure to provide cash and stock and the inability to gain computer access, Wade was unable to perform anything

⁶ The Employer agrees that a bargaining unit employee would have "reasonable cause to believe" that a PDI could result in disciplinary action. See, answer to complaint, par. 7. (GC Exh. 1(f).)

⁷ Neurohr is often referred to as "Desi."

⁸ All of the witnesses were somewhat vague about the dates. As best I can determine, it appears that the incident occurred on either March 12 or 19. It is not necessary to establish the precise date.

more than minimal duties at Crafton. As a result, the facility was understaffed and customers experienced lengthy delays. Melko testified that lines were "out the door." (Tr. 114.) This led to a number of customer complaints.

Shortly after the day of the incident, Melko's superior instructed him to "find out what's going on, and deal with it." (Tr. 114.) Melko testified that due to the customer complaints, he considered this to be a "serious issue" and he resolved to conduct "formal investigative interview[s]." (Tr. 114.) He decided to interview Johnson because the T-6 was "responsible for assigning a cash drawer, making sure that Paulette Wade had access to stock." (Tr. 117.) Similarly, he selected Talmadge for interview because she "couldn't enter Paulette Wade that particular day into the computer, she didn't remember how, she didn't know how." (Tr. 117.)

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In keeping with established practice, Melko initiated the investigatory process by telephoning Neurohr at the Union's office. Both men agree Melko told Neurohr that "he wanted to conduct PDI's with both Mr. Johnson and Miss Talmadge." (Tr. 49.) They discussed the date and time for the interviews. They also agree during this conversation Neurohr asked Melko, "what it was about, and he told me, 'I'm not going to tell you that, you will find out when you get here." (Tr. 50.) As Melko put it in his testimony, "[I]t was my understanding that I was not obligated to provide him that information at that time. And I indicated that." (Tr. 120.) Both men also confirm Neurohr objected to the failure to provide the information, telling Melko that he was "wrong" in believing that he did not have to provide it. (Tr. 120.) Melko testified that it was clear that Neurohr "was not happy" with his refusal. (Tr. 120.)

There is some dispute in the testimony as to a collateral point. Neurohr testified that he told Melko to "check with his labor relations people" in the hope that they would correct his misunderstanding of the legal requirements for notice. (Tr. 51.) Melko testified that, "I can't recall him telling me to go to somebody else, or to ask somebody . . . I don't recall. I don't recall at this time." (Tr. 146.)

In his opening remarks, counsel for the Employer observed that, "I think this is really one of those cases where there is going to be remarkably little conflict as to what happened." (Tr. 28.) His prediction was essentially accurate. However, to the extent that there were conflicts in the testimony, I credit the accounts of Neurohr, Johnson, and Talmadge. Their descriptions were direct, clear, and consistent. By contrast, Melko was a hesitant, tentative, and diffident witness, perhaps reflecting understandable concern about his status as a newly appointed supervisor whose actions were under intense scrutiny. His demeanor and presentation did not bolster the reliability of his account.⁹

Given these considerations, I credit Neurohr's assertion that he advised Melko to check with the Employer's labor relations specialists. ¹⁰ In any event, it is clear that during this initial telephone contact the union representative asked the supervisor for information regarding the subject matter of the investigatory interviews and the request was refused. As counsel for the Employer put it at the beginning of the trial,

[W]e are not going to be challenging that a couple of days before the

⁹ To be fair, I do not mean to suggest any impropriety on his part. As indicated, the great bulk of his testimony was consistent with the other evidence in the record.

¹⁰ Counsel for the Employer opined that had Melko in fact called the Employer's labor relations specialists he "would have been advised to reveal the subject of the interview[s]." (GC Exh. 7, p. 8.)

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[interviews] at issue in your case, when he [Melko] happened to call the union office . . . Mr. Neurohr asked him what the subject is going to be, and Mr. Melko said, "I don't think I need to tell you at this time."

(Tr. 27.)

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During their conversation, Neurohr and Melko set the interviews for March 21. A scheduling problem arose and the date was adjusted to March 25. Neurohr testified that during this period, he did not contact Johnson or Talmadge. By the same token, they made no attempt to speak with him.¹¹

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Neurohr testified that, on March 25, he drove to the Crafton office. He encountered Johnson and Talmadge, both of whom had no knowledge of the plan to conduct PDI's. He told them "they got a PDI scheduled, and they will be up to get you [for the interviews]." (Tr. 67.) He did not discuss the possible subject matter of the interviews with either employee. He then proceeded to the site of the interviews, a small conference room.

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Melko also drove to the Crafton facility. He met Steve Reed, an individual who had been selected to serve as an observer of the interviews on behalf of management. He also noted the presence of Neurohr. Melko then went into the work area and told Johnson and Talmadge, "We are going to start, we are going to have investigative interviews today, your representative is here." (Tr. 123.)

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The first interview involved Johnson. In addition to him, present were Melko and Reed on behalf of the Employer and Neurohr as union representative. Neurohr testified that he began the interview by telling Melko, "I would like to know what this is about, I believe I have the right to know what it is about, and I would like to meet with Mr. Johnson prior to us starting." (Tr. 55.) He further testified that Melko responded to this request by telling Neurohr that, "No, you are not . . . going to do that. Let's start the interview." (Tr. 53.) Neurohr objected, telling Melko,

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I still believed I had the right to know what it's about, and to meet with the employee prior to the beginning. However – and I told him I thought it was a violation of the law, I would be filing a charge [with the Board], but we would continue – we would partake in the interview. We would participate in the interview, I said, "Start your questions, and let's get the interview going."

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(Tr. 53—54.)

Melko's testimony essentially corroborated this account. He reported that things began when Neurohr asked, "Am I going to know what the interview was about?" (Tr. 128.) He reported that he replied, "Not at this time. You know, not right now. When we get started." (Tr. 123.)

After this initial dialogue, Melko began the questioning of Johnson. 12 His first question

¹¹ The failure of the bargaining unit members to contact their union representative is not surprising since, as will be discussed, they were completely unaware of the impending predisciplinary interviews.

¹² There is no dispute about the content of the questions. All parties agree that Neurohr took detailed, almost verbatim, notes. Indeed, he frequently interrupted the flow so that he Continued

was, "Have you been instructed by [a supervisor] to split the cash retained in preparation for employees from Greentree who may be needed to work the window at the Crafton Finance Station?" (GC Exh. 7, p. 9 and Tr. 142.)

Melko's next question was, "Are you aware of your responsibilities as a T-6 to allow for and help employees to be able to work the window when needed?" (GC Exh. 7, p. 9 and Tr. 142.)

In the third question, Melko became more specific, asking Johnson,

Are you aware of the inability of Paulette Wade this past Saturday to work in a productive capacity at the Crafton Finance Station due to her not only being [un]able to be entered correctly in the POS One system but also because she did not have adequate money or stock available for her?

20 (GC Exh. 7, p. 9 and Tr. 142—143.)

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Melko's final question simply asked Johnson if he wished to raise any "extenuating circumstances" for these "failures of responsibility." (GC Exh. 7, p. 9.) The interview lasted approximately 5 to 10 minutes. Neurohr reported that he was allowed to participate in the interview and was not required to remain a passive observer. It is undisputed that following the interview no disciplinary action was taken against Johnson.

Immediately after Johnson's interview, the second PDI was conducted involving Talmadge. In addition to her, Neurohr, Melko, and Reed were present. Neurohr testified that, once again, he began the session by asking Melko, "What is this about? I believe I have the right to know what this is about, and the right to confer with Miss Talmadge before we begin." (Tr. 70.) Melko responded that, "I'm not telling you. Let's start the interview." (Tr. 70.) Neurohr again warned Melko that his conduct violated the Act and that he would be filing a charge with the Board, "but that we would not be insubordinate, and we would participate in the interview." (Tr. 70.)

As with Johnson's interview, Melko's account substantially corroborates that of Neurohr. Melko testified that Neurohr began by asking him, "Am I going to know what this is about?" (Tr. 132.) He told Neurohr, "When we begin, you know, not at this time." (Tr. 132.) On direct examination, Melko contended that Neurohr never asked for time to consult with Talmadge. On cross-examination containing reference to Melko's prior affidavit, he conceded that Neurohr had, in fact, asked him, "Will you tell me what this is about, so I can have a discussion with my [union] member?" (Tr. 141.)

After the initial exchange, Melko began his questioning of Talmadge.¹³ His first question was, "Have you been adequately trained in the POS One system so as to be able to enter an employee into the database for your station?" (GC Exh. 7, p. 10 and Tr. 143.)

could transcribe everything precisely. In addition, Melko had prepared a written list of his questions and that list confirms the accuracy of Neurohr's notations. (GC Exh. 7, pp. 9-10.)

¹³ As to the content of his interrogation, I am again able to rely on the remarkable consistency between Neurohr's notes as to what was asked and the written list of questions prepared by Melko.

He then asked Talmadge, "Has your T-6 taken the time and made the effort to be sure that your abilities on the POS One system [are] sufficient to conduct daily operational procedures?" (GC Exh. 7, p. 10 and Tr. 143.)

As with Johnson, it was during the third question that Melko became specific about the incident under investigation, asking Talmadge:

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Are you aware of the inability of Paulette Wade this past [Saturday] to work in a productive capacity at the Crafton Finance Station due to her not only being [un]able to be entered correctly in the POS One system but also because she did not have adequate money or stock available for her?

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(GC Exh. 7, p. 10 and Tr. 144.)

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Melko asked two more questions, one about Talmadge's prior experience on Saturdays and a final one seeking to elicit any extenuating circumstances. The interview lasted approximately 15 minutes. There is no contention that Neurohr was denied the opportunity to be an active participant. Subsequent to the interview, management did not take any disciplinary action against Talmadge.

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As he had promised, Neurohr filed a charge against the Employer on April 5. This was amended some months later and, on January 30, 2006, the Regional Director issued the complaint and notice of hearing.

III. Legal Analysis

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A. The Alleged Weingarten Violations

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The substantive issues in this case involve the parameters of a bargaining unit member's right to the presence of a union representative during an investigatory interview. In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court upheld the Board's determination that the Act afforded a right to such representation whenever the bargaining unit member had a reasonable basis for believing that the interview could lead to disciplinary action.¹⁴

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The Supreme Court, in the process of approving the Board's construction of the Act, referred to fundamental principles of administrative law by observing that it would be the Board's further responsibility to develop "the contours and limits of the statutory right." 420 U.S. at 256. In the course of doing so, the Board has taken particular note of the *Weingarten* Court's articulation of the rationale underlying the right to union representation. A central aspect of that rationale found a potential confluence between the interests of labor and management. It was

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¹⁴ There is no contention in this case that Johnson and Talmadge lacked a basis to reasonably conclude that they could suffer discipline depending on the outcome of their interviews. Apart from the Employer's own characterization of these meetings as "predisciplinary interviews," the nature of the inquiry was analogous to circumstances that the Board has found to entitle an employee to the exercise of the *Weingarten* right. See, for example, *Quazite Corp.*, 315 NLRB 1068, 1070 (1994), enf. denied on other grounds 87 F.3d 493 (DC Cir. 1996) (*Weingarten* right applied during meeting to inquire as to what could be done to improve employee's poor production.)

expressed as follows:

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A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A *knowledgeable union representative* could assist the employer [as well as the employee] by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. [Emphasis added.]

15 420 U.S. at 262-263.

The eventual outcome of the Board's delineation of the contours of the *Weingarten* right was ably summarized by an administrative law judge who noted that the "[p]ermissible extent of participation of representatives in interviews thus is seen to lie somewhere between mandatory silence and adversarial confrontation." *Postal Service*, 288 NLRB 864, 867 (1988). To place the issues in this case in context, it is worthwhile to conduct a brief examination of the balance that the Board has struck.

Obeying the Supreme Court's injunction that the *Weingarten* right must not turn a disciplinary interview into an "adversary contest," the Board has placed clear limits on the scope of the right. 420 U.S. at 263. For example, the right does not encompass a demand for representation by an attorney. *TCC Center Cos.*, 275 NLRB 604, fn. 2 (1985). Nor does it grant the representative the right to call witnesses on the employee's behalf. *Coyne Cylinder Co.*, 251 NLRB 1503, fn. 6 (1980). Likewise, the representative cannot instruct the employee to decline to answer repetitive questions. *New Jersey Bell Telephone Co.*, supra.

On the other hand, the Board has also held that the union representative may properly object to interview questions that can reasonably be construed as harassing. *New Jersey Bell Telephone Co.*, supra. Similarly, an employer is prohibited from demanding that the representative's participation consist solely of silent presence as an observer of the interview. *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980), enf. denied 667 F.2d 470 (5th Cir. 1982). Recently, the Board affirmed this principle, noting that, "Such a limitation is inconsistent with the Supreme Court's recognition that a union representative is present to *assist* the employee being interviewed." [Emphasis in the original. Citations omitted.] *Barnard College*, 340 NLRB 934, 935 (2003).

This brings us to consideration of the Board's precedents regarding the union representative's right to advance notification of the subject matter of the interview and opportunity to engage in meaningful pre-interview consultation with the employee. The Board first addressed the right to prior consultation between the union representative and the employee in *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978). In that case, the Board adopted the General Counsel's view that *Weingarten*

¹⁵ The Board has cited the judge's formulation with approval. *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279 (1992).

¹⁶ Although the Court of Appeals denied enforcement, the Board has since noted that the denial of enforcement did not rescind or modify the Board's commitment to the principles articulated in that case. See, *Postal Service*, 288 NLRB 864, 866 (1988) (affirming the administrative law judge's analysis regarding the continuing vitality of *Climax Molybdenum*.)

"logically permits prior consultation if the union's presence is to be an effective presence." Id. at 1189. Citing the Supreme Court's characterization of the *Weingarten* right to a "knowledgeable" representative, the Board held that the right to representation "clearly embraces the right to prior consultation." Id. at p. 1190. In words that speak directly to the conduct at issue in this case, the Board encapsulated its rationale by suggesting that "knowledge is a better basis than ignorance for the successful carrying on of labor-management relations." Id at 1190.

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Counsel for the Employer correctly notes that the holding in *Climax Molybdenum* was viewed as somewhat controversial. Nevertheless, the Board took the opportunity to clearly reaffirm its position in a later case that involved exactly the same two issues as are present in the case before me. In *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), enf. in pertinent part 711 F.2d 134 (9th Cir. 1983), the employer refused to allow pre-interview consultations between the employees and their representative. In addition, management merely informed the representative that the subject of the interviews concerned a "problem" involving two employees. The administrative law judge, citing *Climax Molybdenum*, found a violation of the right of consultation. As the Board put it,

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She further found that, for the right to prior consultation to have any meaning, the employee and his representative must have some indication of the matter being investigated for, without it, there is nothing about which to consult.

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262 NLRB at 1048.

Citing its rationale in *Climax Molybdenum*, the Board agreed with the judge, holding that her conclusions were "consistent with, and required by," the *Weingarten* decision. 262 NLRB at 1048. As the Board characterized it,

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If the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation.

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262 NLRB at 1048. The Board's ultimate conclusion was that *Weingarten* encompassed a right to "access before the interview to a knowledgeable representative who can counsel and aid the employee as to the accusation in hand." 262 NLRB at 1049.

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It is an unfortunate reality that, in each decade since *Pacific Telephone & Telegraph* was decided, the Board has been called upon to reaffirm these principles in cases involving the Postal Service. In 1988, it found a violation of the Act when the Postal Service refused a representative's request for a pre-interview consultation. *Postal Service*, 288 NLRB 864 (1988). It did the same thing in 1991. *Postal Service*, 303 NLRB 463 (1991). Interestingly, the Board was affirmed on appeal in that case, with then-Judge Ruth Bader Ginsburg providing a definitive summary of the appropriate rationale:

¹⁷ The Board did note that it was not granting a right to anything comparable to discovery in civil litigation. It was simply requiring the advance provision of a "general statement as to the subject matter of the interview, which identifies . . . the misconduct for which discipline may be imposed." ²⁶² NLRB at 1049. There is no contention in this case that the Employer met this standard. To the contrary, the evidence is clear that it refused to provide any advance information whatsoever.

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The NLRB determined that the employee's *Weingarten*-recognized right . . . of "[a] knowledgeable union representative," . . . sensibly means a representative familiar with the matter under investigation. Absent such familiarity, the representative will not be well-positioned to aid in a full and cogent presentation of the employee's view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors. [Citations, including one to *Climax Molybdenum*, omitted.]

Postal Service v. NLRB, 969 F. 2d 1064, 1071 (DC Cir. 1992).

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Most recently, the Board again addressed the precise issues involved in this case in another unfair labor practice case involving the Postal Service. In a decision issued August 27, 2005, it summarized the issues and its holding:

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The judge found, and we agree, that the Respondent violated Sec. 8(a)(1) on September 9, 2003, and December 4, 2003, by refusing to permit [an employee] to speak with his union representative and on December 4, 2003, by failing to notify [that employee] and his union representative of charges prior to an investigatory interview.

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Postal Service, 345 NLRB No. 26, slip op. at fn. 2 (2005).

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It is evident that in this area the Board's standards for compliance with *Weingarten* are clear and crisp. As articulated in *Climax Molybdenum*, *Pacific Telephone & Telegraph*, and several *Postal Service* cases, an employer, upon request, must inform the union representative for an employee who will be subject to an investigatory interview of the subject matter under review. Furthermore, the provision of this notification must be made sufficiently in advance of the interview so as to allow the employee and his or her union representative to engage in meaningful consultation for the purpose of preparing for the interview. It is noteworthy that neither the supervisor whose conduct is under evaluation in this case nor counsel for the Employer contended otherwise. Indeed, both expressed an accurate understanding of the requirements and their rationale.

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In a letter regarding the events at issue in this case addressed to the Board's Contempt Litigation and Compliance Branch dated July 26, counsel for the Employer, in a manner commendably consistent with the obligations of our profession, noted that the supervisor, Melko, "missed a nuance, albeit an important one. The point of law is that, upon request, the steward or employee is entitled to a bare description of the issue to assist the steward in providing adequate representation." (GC Exh. 7, p. 6.) Indeed, he opined that, if Melko had sought guidance from the Postal Service's labor relations specialists, he "would have been advised to reveal the subject of the interview." (GC Exh. 7, p. 7.) Furthermore, as counsel properly acknowledged in his brief,

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The right to have [the assistance of] a steward has been interpreted as the right to an effective steward, which means the steward cannot be compelled to remain silent and, if he or she asks ahead of time, the right to a short statement of the issue to be discussed at the investigative interview.

(R. Br. at p. 2.)

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Similarly, in his testimony, Melko expressed his comprehension of the legal requirements and their rationale. When asked about the need for meaningful consultation prior to the investigatory interview, he observed that the purpose was,

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So that Desi [Neurohr] would understand what was being looked at, in the interview—the interview of Denise [Talmadge] or Floyd [Johnson], to get the basics, their side of things, you know, so he had a better understanding of what went on, so he could represent them well.

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(Tr. 137.) It would be difficult to express the point any more clearly.

While the Employer agrees that the law required Melko to provide an appropriate answer to Neurohr's inquiries as to the subject matter of the upcoming interviews and to do so sufficiently in advance to afford time for meaningful consultation between Neurohr and the employees, it is undisputed that this was not done. As the Postal Service put it in its initial position statement in this matter.

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Prior to each employee's interview, Mr. Neurohr asked if he would be permitted to know the purpose of the interview so he could discuss it with each employee. Supervisor Melko advised that he would not divulge the content prior to the interview simply because he was not required to do so.

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(Letter of June 9, GC Exh. 6, pp. 1—2.) The evidence at trial confirmed this account.

During the trial, the Employer presented testimony regarding Melko's assumption that he was not required to provide advance notification of the interview topic. Essentially, Melko testified that, shortly before the events at issue, he had observed another supervisor conduct a predisciplinary interview. Based on what occurred during that interview, he concluded that he was not required to divulge the topic before the interview.

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There are two difficulties with this attempt to explain the supervisor's behavior. First, while it may serve to show that Melko's conduct was reasonable, it does not, and cannot, show that it was lawful. The Board, having been vested with the power to select from among reasonable courses of action, chose not to permit an employer to refuse to divulge the topic of an investigatory interview. Second, Melko's testimony regarding what he observed in the prior interview conducted by a more experienced supervisor actually undermined the reasonableness of his conduct. The interview that he observed was conducted by Supervisor Mike Priore. Neurohr was the union representative. Melko testified that, as the interview commenced, "Mike [Priore] made a statement, you know, beginning, opening the interview, what the topic was, and Desi [Neurohr] asked for time [to consult with the employee], and Mike provided that." (Tr. 111.) Without agreeing that this procedure would have afforded the opportunity for meaningful consultation required by the Board, it is apparent that it still provided considerably more notice to the representative than the procedure actually employed by Melko in this case. 19

¹⁸ As to the timing of such notification, counsel for the Employer correctly observed that management had a duty to respond to Neurohr's question about the nature of the topic "at a point at which it is meaningful." (Tr. 104.)

¹⁹ Under cross-examination, Melko conceded that the procedure he employed differed from Continued

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In addition, the manner in which Melko questioned the employees leads me to infer that he specifically intended to keep them and their representative in the dark as to the subject matter. He did so in both cases as part of an investigatory technique. In each interview, Melko, proceeding in an oblique fashion, posed introductory questions of a general nature before honing in on the precise issue under investigation. As any cross-examiner will agree, this method of proceeding locks the witness' position into place regarding the generalities before exploring the specifics. Melko testified that it was only during the third of his questions to Johnson and Talmadge that he raised the specific incident involving Wade. I conclude from all this that Melko's failure to provide advance notification so as to enable meaningful consultation was not inadvertent. It was part of his deliberate strategy for the conduct of each interview.²⁰

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In sum, nothing presented by the Employer in the way of explanation or justification for Melko's conduct will serve to alter the legal conclusion mandated by the undisputed facts. ²¹ The union representative for these employees made two requests for information regarding the subject matter of each investigatory interview. Those requests were denied in their entirety. As a direct consequence, the interviews were conducted without first affording the employees and their representative a meaningful opportunity to consult so as to prepare their response to the inquiry.

25 being able to make adequate preparations for the interview through informed consultation with Johnson and Talmadge in order to learn their version of the events and their explanations for what transpired on the Saturday in question. Beyond these key discussions with his bargaining unit members, the refusal to disclose the subject matter at issue prevented Neurohr from examining the collective-bargaining agreement to determine what it said about the matter, researching the parties' extensive materials designed to assist labor and management in implementation of the collective-bargaining agreement, 22 investigating the practices of this workplace regarding these issues, and pondering the whole question with a view to assisting in the resolution of the problem. As a result, the *Weingarten* goal of providing a knowledgeable union representative equipped to enhance the trustworthiness of the investigatory process in the interests of both labor and management was substantially frustrated.

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the procedure used by Priore during the interview that he had observed. Priore began that interview by making a "statement" about the matter under investigation. (Tr. 141.) By contrast, Melko started by posing the first of his list of questions.

²⁰ I am not suggesting that Melko's interrogation technique was unfair. It would ill-suit an old cross-examiner to make that accusation. The point is only that the Board, for clearly articulated reasons related to national labor relations policy, has chosen not to permit the employer to refuse a request for information regarding the subject matter of an interview, even if granting that request will frustrate the employer's chosen interview tactic.

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²¹ Recently, the Board has taken note of a variety of developing workplace conditions that could affect the rationale for *Weingarten's* applicability in certain situations, including legal requirements imposed by other statutory schemes and the current national security environment. *IBM Corp.*, 341 NLRB 1289, 1291-1293 (2004). None of these considerations are involved in this case. Melko agreed that the subject of these interviews was merely a "[r]outine" workplace issue with no national security or criminal investigatory implications. (Tr. 72.)

²² For example, the parties have a lengthy joint contract interpretation manual whose "primary purpose" is to provide guidance as to compliance with their collective-bargaining agreement. (Employer's Motion for Summary Judgment, attachment A, GC Exh. 1(g).)

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Although essentially conceding that it failed to afford Johnson and Talmadge the full extent of the *Weingarten* rights required by the Board, the Employer attempts to minimize this misconduct in two related ways. Counsel for the Employer asserts that Neurohr knew or should have known what the topic of the investigatory interviews would be. He speculates that Neurohr would have had "plenty of time" to ask his bargaining unit members for their opinions about the subject matter and adds that Talmadge "would have to have been asleep" not to respond that the topic must concern the events on Saturday at Crafton. (R. Br. at p. 7.)

I agree with counsel for the General Counsel's two-fold response to this argument. As she notes, the obligation to provide advance information regarding the subject matter of an investigative interview when requested is not in any way dependent on the state of knowledge of the requesting union official. The duty exists, "regardless of whether the inquiring employee and/or union representative may be fairly certain of the subject matter by independent means." (GC Br. at p. 26.) I share counsel for the General Counsel's view that the assertion of this justification by the Employer "serves only to illustrate Respondent's continuing inability to accept and/or understand its statutory obligations" in this area of labor relations. (GC Br. at p. 27.)

In confirmation of counsel for the General Counsel's point, it is noteworthy that the Employer argued that the conduct in this case was de minimus. Citing *Musicians Local* 76 (*Jimmy Wakely Show*), 202 NLRB 620 (1973), counsel for the Employer contends that the denial of advance information regarding the subject matter of the two investigatory interviews was so trivial an offense as to render it inappropriate to issue any remedial order. I reject this view. The Employer's history of difficulties in this area of law and the flagrant nature of the violations proven in this case preclude any attempt to characterize the misconduct as too minor to merit the application of the Board's enforcement mechanisms. As the Board noted in rejecting a similar argument in another *Weingarten* case, there is no evidence that the unlawful conduct has been "substantially remedied or effectively contradicted by later conduct." *Dish Network Service Corp.*, 339 NLRB 1126, 1128, fn. 11 (2003). The deliberate and repeated failure to provide the required notice constituted a significant deprivation of the employees' statutory right to effective assistance of a union representative during an interview that could reasonably be anticipated to result in disciplinary action. As such, it is misconduct that calls for the imposition of an appropriate remedy.

I conclude that the Employer's conduct in twice denying the union representative's requests for information as to the subject matter of each investigatory interview and in proceeding with each interview without providing that information violated Section 8(a)(1) of the Act.²⁴

²³ In any event, I credit the testimony of the General Counsel's witnesses indicating that they were unaware of the subject matter of the interviews.

²⁴ The *Weingarten* right arises under Sec. 8(a)(1) of the Act. See the interesting discussions of this theoretical underpinning to *Weingarten* in the opinions of various Board Members in *IBM Corp.*, supra. In this case, the root of the *Weingarten* violation was the failure to provide relevant information to the Union, information that was required in order for it to perform its duties as representative of the bargaining unit's members. In analogous circumstances, the Board considers the failure to provide such information to be a violation of Sec. 8(a)(5) of the Act. *Postal Service*, 337 NLRB 820, 822 (2002), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) (refusal to provide information relevant to the union's processing of an employee's grievance violates Sec. 8(a)(5).) The General Counsel did not charge a violation of Sec. 8(a)(5) in this case, and I do not reach the issue. Nevertheless, the close relationship between the

5 B. The Deferral to Arbitration Issue

As I have indicated in the preceding section of this decision, the Employer has not mounted a major challenge to the General Counsel's contention that it committed several *Weingarten* violations in this case. Instead, it grounds its position on an affirmative defense, its belief that the Board should defer these proceedings in order to permit the operation of the parties' grievance arbitration process. It first raised this issue before trial by filing a Motion for Summary Judgment on March 30, 2006. (GC Exh. 1(g).) The General Counsel filed an opposition. (GC Exh. 1(h).) On April 25, 2006, the Board denied the Employer's motion, noting that the record revealed the existence of "genuine issues of material fact concerning the appropriateness of deferral." (GC Exh. 1(l).) However, the Board made its ruling without prejudice to the renewal of the request before me.

The Employer has renewed the request for deferral, filing another Motion for Summary Judgment on May 4, 2006. (R. Exh. 1.) As noted in counsel for the Employer's cover letter, the renewed motion contains essentially the same arguments, adding additional suggestions as to those portions of the parties' collective-bargaining agreement that are asserted to apply to any grievance filed concerning the conduct at issue in this case. (R. Exh. 1, p. 1.) Once again, the General Counsel opposes deferral for a number of reasons. Having now developed the factual record, I will address the Employer's affirmative defense.

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The parties agree that resolution of this dispute is governed by application of the Board's deferral doctrine stemming from *Collyer Insulated Wire*, 192 NLRB 837 (1971). In *Collyer*, the Board deferred the parties' controversy to contractual arbitration, finding that the issue "in its entirety" arose from the parties' collective-bargaining agreement, its resolution would be assisted by application of an arbitrator's "special skill and experience," and arbitration would provide a "fully effective remedy" in the event a violation was found to have occurred. Id. at 840. The Board observed that:

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[W]here, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.

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Id at 841—842.

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Recently, the Board enumerated the list of factors it will consider in deciding whether to exercise its discretion in favor of deferral to the arbitration process. It held that:

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Deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-

unlawful conduct in this case and the requirements of Sec. 8(a)(5) is relevant to my assessment of the Employer's motion to defer this matter to arbitration. I will discuss this in detail in the next section of this decision.

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bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

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Wonder Bread, 343 NLRB No. 14, slip op. at 1 (2004), citing *United Technologies*, 268 NLRB 557, 558 (1984). See also, *United Cerebral Palsy of New York City*, 347 NLRB No. 60, slip op. at 3 (2006).

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Having considered the arguments of the parties and the factual record, I find that the dispute in question is not appropriate for deferral to arbitration for a number of reasons. While there is no contention that the parties have not had a lengthy and useful history of collective bargaining, there is considerable evidence that this employer has demonstrated animosity to the employees' exercise of their *Weingarten* rights and other closely related rights. While the parties' agreement may provide for arbitration in a wide variety of circumstances, I cannot find that it "clearly encompasses" the issue in dispute in this case. Finally, although the Employer is plainly willing to submit the matter to arbitration, I am convinced that the nature of the dispute and the history of the parties' *Weingarten* and related problems demonstrate that the dispute is not well suited to arbitral resolution. I will discuss each of these conclusions in turn.

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Counsel for the General Counsel contends that the Employer is a "recidivist violator" of the bargaining unit members' *Weingarten* rights. (Tr. 31.) The Employer counters that Melko's conduct was a mere "very minor technical violation" and that its history of *Weingarten* violations simply demonstrates that, given its huge size, it is "just not perfect." (Tr. 44, 45.)

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The reports of the Board's proceedings reveal a long history of *Weingarten* violations, going back at least as far as 1979. *Postal Service*, 241 NLRB 141 (1979). Perhaps the most egregious example occurred in 1981. *Postal Service*, 254 NLRB 703, 707 (1981) (refusal to permit steward to attend disciplinary interview of employee who had been "hired under a mentally handicapped program."). Another case followed shortly thereafter. *Postal Service*, 260 NLRB 221 (1982). Interestingly, a few years later the Union and the General Counsel tried the alternate approach suggested here, allowing a *Weingarten* issue to proceed to arbitration.²⁶

²⁵ Counsel for the Employer, admitting that his client has committed prior *Weingarten* violations, suggests that a violation rate of .0001 percent would be unimportant. As he puts it, "I know of no law that requires perfection." (Tr. 44.) This is an argument not well calculated to win sympathy from those charged with enforcement of the Act. In my many years as a prosecutor, defense attorney, and judicial officer in the field of criminal law, I never heard this argument presented in quite this way. Certainly, even the most hardened career criminal could rightly claim that he or she violates the law only a small percentage of the time. Just as every citizen's baseline obligation is to be law abiding, so every employer's (and labor organization's) baseline duty is to comply with the Act. While none of us are perfect, a litigant cannot simply expect to sigh, shrug its corporate shoulders, and muse on the imperfectability of human nature as its response to alleged misconduct. I note that the Postal Service has recently made a similar argument to one of my colleagues, contending that 11 unlawful failures to provide information to the union out of 225 such requests represented only a small percentage of violations. My colleague wondered if the Respondent would also "find it acceptable if 11 out of 225 letters were misdelivered." *Postal Service*, 10—CA—35999, JD(ATL)—18—06, slip op. at 4 (2006).

²⁶ After completion of the arbitration, the General Counsel challenged the result. The Board Continued

Postal Service, 275 NLRB 430 (1985).

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This was followed by another *Weingarten* case in 1988, *Postal Service*, 288 NLRB 864 (1988). That case involved a failure to permit pre-interview consultation with a union representative. It was followed by a similar allegation in 1991. *Postal Service*, 303 NLRB 463 (1991). As a result, the Board issued a nationwide cease-and-desist order and notice posting remedy. The case was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the imposition of the broad remedy, noting that the Postal Service was a repeat offender and that it continued to maintain an investigatory manual for postal inspectors that instructed them to deny all requests for consultation with a union representative prior to conducting interviews. Based in part on the "USPS's evident disregard of a prior Board order," the court upheld the Board's nationwide remedy. *Postal Service v. NLRB*, 969 F.2d 1064, 1073 (D.C. Cir. 1992).

The problem persisted to the extent that in 2003 the Board attempted another innovative approach to seek compliance with its *Weingarten* requirements from the Postal Service. In December 2003, the United States Court of Appeals for the District of Columbia Circuit approved a consent order entered into between the Board's Contempt Litigation and Compliance Branch (CLCB) and the Postal Service. That order required the Postal Service, with the assistance of the CLCB, to develop and utilize a course of study in its associate supervisor program covering the following topics:

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[P]re-interview consultation rights to be accorded to employees facing interviews with management officials that might lead to discipline; employee rights to union representation at interviews with management officials that might lead to discipline; the role of union stewards or other employee representatives at such interviews; and the rights of employees to exercise the foregoing rights without reprisal by management.

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(Consent order, p. 1, GC Exh. 2.)²⁷ In addition, the Postal Service was required to provide similar information to all of its supervisors and to repeat this exercise 2 years later. Finally, it was required to provide reports to the CLCB regarding any future "filing of an unfair labor practice charge alleging acts which would constitute violations of this Consent Order."²⁸ (Consent order, p. 4, GC Exh. 2.)

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In an unfortunate and perhaps revealing coincidence, after the Postal Service had signed this consent order and a day before its approval by the Court of Appeals, a postal supervisor failed to notify an employee and his union representative of the subject matter of an investigative interview and failed to permit that employee to consult with the representative prior

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²⁷ It is somewhat disheartening to observe that Melko graduated from this associate supervisor program approximately a year after the entry of this consent order with its provision for thorough instruction on *Weingarten* rights.

chose to defer to the arbitrator's decision under its *Spielberg* doctrine. *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955). Counsel for the Employer cites this case in support of his current request for deferral. To the contrary, given the number of *Weingarten* violations established against the Employer since 1985, the evidence indicates that this approach has been tried and has failed.

²⁸ It appears that the Postal Service has complied with this requirement regarding the charges filed in this case. See letter of July 26, 2005, from counsel for the Employer to the CLCB, GC Exh. 7.

to that interview. As a result, charges were filed and the Board found the violations in a subsequent decision. *Postal Service*, 345 NLRB No. 26, slip op. at fn. 2 (2005). I note that the conduct in question is identical to what occurred in the case before me. Based on this violation and others involved in that case, the Board concluded that the Postal Service "demonstrated a proclivity to respond unlawfully to the employees' meaningful exercise of their statutory rights." Id. at slip op. 1. In consequence, it imposed a remedy that included the issuance of a broad cease-and-desist order. Lastly, the Board has just issued another decision finding a fundamental type of *Weingarten* violation, a demand by the supervisor that the union representative at a predisciplinary interview remain silent throughout the questioning. *Postal Service*, 347 NLRB No. 89 (2006).

In addition to these reported Board decisions finding *Weingarten* violations, counsel for the General Counsel has drawn my attention to a number of pending cases alleging additional violations. On February 9, 2006, a complaint was filed in Case 25—CA—29340, alleging a failure to permit union representation of a bargaining unit employee during an investigatory interview in Indiana. (GC Exh. 5.) By another unfortunate coincidence, that case proceeded to trial on the same day that I heard the evidence in this case. In her decision in that case, the administrative law judge found a *Weingarten* violation, albeit one that she characterized as isolated and minor. On February 21, 2006, a complaint was filed in Case 10—CA—34974, alleging numerous failures to permit union representation of employees during interviews in Alabama. (GC Exh. 3.) In yet another apparent coincidence, on the same day a similar complaint involving locations in Texas (Case 10—CA—36056) was filed alleging failure to permit union representation and imposition of a requirement that a union representative remain silent during an interview. (GC Exh. 4.) I am further advised that another *Weingarten* case arising in New Mexico has been filed in Case 28—CA—20249. (See GC Exh. 1(h), pp. 1—2.)

In examining the Respondent's conduct in order to assess the wisdom of deferral of this matter to arbitration, I find it appropriate to consider the surrounding context beyond the *Weingarten* aspect of this case. Unlike other *Weingarten* violations, the unlawful conduct in this case implicates more than merely the rights of employees to be free from employer interference, restraint, or coercion pursuant to Section 8(a)(1) of the Act. Although not included in the formal complaint filed by the General Counsel, the refusal to provide the union representative with any information whatsoever regarding the subject matter of the investigative interviews of Johnson and Talmadge struck at additional protected activity, the union's right provide effective representation of its members through the process of collective bargaining pursuant to Section 8(a)(5) of the Act.³⁰

²⁹ Of course, these are just charges, not established violations. I list them because they demonstrate that the Union and the General Counsel continue to believe that the Employer is engaging in *Weingarten* violations.

³⁰ For example, the Board, citing extensively from *Asarco, Inc.,* 316 NLRB 636, 643 (1995), enf. in relevant part 86 F.3d 1401 (5th Cir. 1996), held that the Postal Service must provide information needed by the bargaining representative for proper performance of its duties, including the duty of representing employees in the grievance process. *Postal Service,* 337 NLRB 820 (2002). At least to the extent that a representative is entitled to know the subject matter of an investigatory interview, there is no meaningful distinction between representation of an employee in the grievance process and representation during a predisciplinary interview. Indeed, in many cases, there will be continuity of representation when the employer imposes discipline after concluding the investigation and the discipline is challenged through the grievance process.

Interestingly, the Board maintains a flat prohibition against deferral of alleged failures to provide information in violation of Section 8(a)(5).³¹ See, *Postal Service*, 337 NLRB 820, 823 (2002), citing *Postal Service*, 302 NLRB 918 (1991). The Board has applied this policy broadly, not merely to information requests directly related to contract negotiations or grievance processing. For example, the Board cited its policy against deferral in denying the Postal Service's motion for such deferral where the union had requested the names of all stewards who had applied for supervisor's jobs. It noted that this information was intended to assist the union in ensuring that its stewards were free from undue employer influence. As a result, the information was "relevant to the performance of its statutory function as the employees' bargaining representative," and the issue was not subject to deferral. *Postal Service*, 280 NLRB 685, at fn. 2 (1986) enf. 841 F.2d 141 (6th Cir. 1988). In my view, such a broad reading of the scope of the nondeferral policy would extend to the circumstances of this case as well.

Apart from any applicability of the Board's nondeferral policy regarding information requests, examination of the Postal Service's record of compliance with its duty to provide relevant information to its employees' bargaining representatives is instructive as to the appropriateness of deferral in this case. That record is dismal. While citing 11 reported decisions documenting violations, the Board has noted that the Postal Service,

has a history of violating Section 8(a)(5) and (1) by failing to provide requested relevant information at many of its locations over the past two decades. [Footnote containing the 11 cited cases omitted.]

Postal Service, 339 NLRB 1162 (2003). Citing this history of "recalcitrance," the Board imposed a broad cease-and-desist order. Id. at 1163.

Since then, the Board has again confronted the problem and spoken directly to the issue before me. In 2005, it found that the Postal Service had a "proclivity to violate the Act" by failing to provide relevant information, and that,

Respondent's history of past failures to address endemic resistance to these requests in various localities strongly suggests that neither self-help measures nor another narrowly-drawn Board cease-and-desist order will suffice to remedy this situation.

Postal Service, 345 NLRB No. 25, slip op. at 3 (2005).

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Under the *Collyer* standard, in order to grant the Employer's request for deferral to the parties' grievance arbitration process, I must find that there is no significant evidence of employer animosity to the employees' exercise of protected statutory rights. *Wonder Bread*, supra, 343 NLRB No. 14, slip op. at 1. The Postal Service's lengthy history of *Weingarten* violations in the face of a variety of remedial approaches attempted by the Board and the Court of Appeals precludes such a finding. To the contrary, that history demonstrates that, in this area of labor relations, the Respondent is a recidivist offender and that deferral to the parties' arbitration process is not well calculated to effectuate the policies of the Act. This is further

³¹ Recently, some Board members have criticized this policy. They nevertheless have recognized that it represents extant Board law. *Pacific Bell Telephone Co.*, 344 NLRB No. 11, fn. 3 (2005).

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underscored when one examines the broader record of the Employer's attitude toward the provision of relevant information necessary to enable the Union to perform its role as collective-bargaining representative of the employees. On the basis of employer history alone, deferral to arbitration is inappropriate.

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In addition to accurately asserting that this employer is disqualified by past conduct from deferral, counsel for the General Counsel also contends that the dispute in this case is not covered by the parties' collective-bargaining agreement. As one would expect, the Board declines to defer if the controversy does not arise under the parties' contract. See *Stevens Graphics, Inc.*, 339 NLRB 457, 460-461 (2003) (refusal to defer issue involving restriction of bulletin board postings where parties' contract does not address the matter). I agree with the General Counsel, finding that the parties' collective-bargaining agreement does not purport to govern the parties' conduct as to the key issue presented in this case.

At the outset, I note that during the early stages of this case, neither party contended that the dispute arose under, or could be resolved by, resort to the parties' collective-bargaining agreement.³² Neurohr twice warned Melko that his refusal to provide information regarding the subject matter of the investigatory interviews was wrong. Pointedly, he never referenced the contract. Instead, he twice threatened that he would file charges with the Board. The Union has never asserted that this matter is governed by the parties' agreement. While the Employer now contends that the issue is properly resolved by resort to the contract, this was not its original position. In its original position statement written on June 9, 2005, the Postal Service cited the collective-bargaining agreement's *Weingarten* language in its entirety and observed that the "above-referenced language does not contain any provision to require management to divulge the content of the interview." (Letter of June 9, 2005, p. 2, GC Exh. 6.)

The Postal Service now contends that this dispute falls within the provisions of three articles of the parties' agreement. I will begin by examining the provision, Article 17.3, that actually does address the *Weingarten* situation. With regard to the matters at issue in this case, that article, in its entirety, states as follows, "If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted." (Collective-Bargaining Agreement at p. 117, R. Exh. 1, attachment A.)³³

There is no claim that Supervisor Melko was a member of the Inspection Service. Thus, by its terms the provision does not apply to interviews conducted by him. Nevertheless, counsel for the Employer contends that the parties' joint contract interpretation manual extends the contract's coverage to this issue. The manual does state that:

The Weingarten rule includes the right to a pre-interview consultation with a steward. Federal Courts have extended this right to pre-meeting consultations to cover Inspection Service Interrogations. [Citation omitted.]

³² The parties' collective-bargaining agreement was effective at the time this issue arose and remains in effect through November 20, 2006. (GC Exh. 1(g), attachment A.) Undoubtedly due to its length, the parties submitted only excerpts of that agreement into evidence.

³³ Art. 17 also grants stewards the right to interview "aggrieved employee(s), supervisors and witnesses during working hours." (Art. 17.3, p. 117.) It is clear from the use of the word "aggrieved" and from the context of the provision that this applies to the stewards' role in processing grievances. It does not address the *Weingarten* situation.

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The employee has the right to a steward's assistance, not just a silent presence, during an interview covered by the Weingarten rule. An employee's Weingarten rights are violated when the union representative is not allowed to speak or is restricted to the role of a passive observer.

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Although ELM, Section 665.3 requires all postal employees to cooperate during investigations, an employee with Weingarten rights is entitled to have a steward present before answering questions. The employee may respond that he or she will answer questions once a steward is provided.

(Joint contract interpretation manual, Art. 17.5, R. Exh. 1, attachment A.)

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While the manual does expand on the terse language of the contract regarding *Weingarten*, by its own terms, the manual "is not intended to, nor does it, increase or decrease the rights, responsibilities, or benefits of the parties under the National Agreement." (Joint contract interpretation manual, preface, R. Exh. 1, attachment A.)

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I note that the manual continues to make specific mention of an interview conducted by the Postal Service's Inspection Service. To that extent, it does not expand on the contract's narrow focus on inspection interrogations. Beyond this, taking the contract and the manual together, there is nothing that addresses the issue of advance notice to the union representative regarding the subject matter of the interview. There is no contention in this case that the Employer failed to provide advance notification of the scheduling of an interview so as to preclude pre-interview consultation for that reason. Nor is there any claim that the representative was excluded from the interview or required to remain passive. The issue in this case concerns the refusal to provide notice of the subject matter with the consequence that any pre-interview consultation between the employee and the union representative was rendered futile. I conclude that the specific language of the contract and its manual do not address the matter before me.

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Counsel for the Employer also cites two general provisions of the contract, article 3, the management-rights provision giving the Employer the right to "suspend, demote, discharge, or take other disciplinary action against such employees," and article 5, the prohibition of unilateral action provision. Article 5 states that the Employer will not take any action affecting terms and conditions of employment as defined in the Act, if such action "violates the terms of this Agreement or [is] otherwise inconsistent with its obligations under law." (Motion for Summary Judgment, p. 4, R. Exh. 1.)

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These very general boilerplate provisions cannot be stretched far enough to cover this narrow dispute about a very specific issue. While the decision to conduct the interviews in this case was broadly related to the overall question of employee discipline, I fail to perceive how citation to management's undoubted right to impose discipline brings the issue within the coverage of the deferral doctrine. It is clear that an arbitrator looking at this problem will not be called on to address management's right to discipline misbehaving employees. By the same token, the Employer's promise to obey all of its "obligations under law" is too sweeping and generalized to be relied on for the purpose asserted by counsel.³⁴ I find this case to be

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³⁴ I recognize that the Board has deferred cases involving alleged unlawful unilateral actions to arbitration based on general contract provisions similar to those cited here by counsel. This is simply not such a case. Compare this case to cases in which the Board has deferred, such as *Wonder Bread*, supra, (unilateral imposition of drug testing), *Hoover Co.*, 307 NLRB 524 Continued

governed by the Board's holding in *U.S. Steel Corp.*, 223 NLRB 1246, 1247 (1976), enf. mem. 547 F.2d 1166 (3d Cir. 1977). In that case, the issue involved distribution of union literature on the employer's premises. The employer sought deferral to arbitration, citing various general contract provisions including one that mandated arbitration "of all complaints and grievances." 223 NLRB at 1247. The Board affirmed the administrative law judge's refusal to defer. The judge had noted that:

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Both the Board and the courts have consistently held that, under *Collyer*, deferral of consideration by the Board is dependent on the express language of the contract. Note that nowhere in this said agreement are there any provisions relating to distribution of Section 7 literature. The authority of the arbitrator is limited to those matters explicitly contained in the contract. Thus, it can be readily seen that there is no authority invested in an arbitrator to hear or decide matters not covered in the contract. Also, it should be added that no evidence was introduced at the hearing that Respondent has any written rule covering the subject of distribution which, by extension, could be construed to be covered by the contract.

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223 NLRB at 1247. See also *Native Textiles*, 246 NLRB 228 (1979) (refusal to defer where issue is "not simply a matter of contract interpretation but rather an alleged interference with a basic statutory right of employees that this Board is entrusted with protecting.")

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Regarding the argument that the parties' collective-bargaining agreement covers the primary issue presented here, I note that the Board's deferral test requires a finding that the parties' arbitration mechanism "clearly encompasses the dispute at issue." *Wonder Bread*, supra, 343 NLRB No. 14, slip op. at 1. I conclude that, to the contrary, there is no specific contractual provision that purports to govern the parties' relations with each other as to the specific question presented. I also find that the generalities in the contract cited by the Employer are too vague to properly empower an arbitrator to resolve this dispute. Finally, I conclude that this dispute involves fundamental employee rights of the sort entrusted to enforcement by the Board in the absence of any clear waiver contained in the collective-bargaining agreement.³⁵

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As another ground for denial of deferral, counsel for the General Counsel raises the issue of the nature of any remedy to be imposed. In *Collyer*, the Board noted that the presence of a "fully effective remedy" was a required element for deferral. *Collyer Insulated Wire*, supra,

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(1992) (unilateral change to smoking policy), and *Dennison National Co.*, 296 NLRB 169 (1989) (unilateral abolition of job classification). The present case does not involve unlawful unilateral changes. Without meaning to be facetious, it is difficult to characterize the Employer's unlawful conduct here as a unilateral change from its extensive history of similar misconduct. In his original Motion for Summary Judgment, counsel for the Employer stated that "[t]here are only several dozen *Weingarten* violation charges filed [against the Postal Service] each year." (Motion for Summary Judgment, p. 12, GC Exh. 1(g).) I have already noted that the Board has found identical violations to those alleged here as recently as last year.

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³⁵ As a corollary, I note that there is nothing about the resolution of the issues in this case that would call into play an arbitrator's specialized skill and knowledge. If the issue had concerned, for example, the duties of T-6 employees, arbitration would be valuable. However, as to the actual issue, the scope of the *Weingarten* right, the specialized skill and knowledge is possessed by the Board.

192 NLRB at 840. Put another way, the dispute in question must be deemed "eminently well suited" to resolution through arbitration. *Wonder Bread*, supra, slip op. at 1. Counsel for the General Counsel argues that, "an arbitrator could not adequately remedy the violation; specifically the remedy is a posting, and the arbitrator cannot order that." (Tr. 31.) When counsel for the Employer was faced with the same question, he suggested that an arbitrator could "issue a cease and desist order, within the context of the contract." (Tr. 23.) He candidly added that, "I suppose if the union wanted to go to court, to enforce an arbitration decision, they could do that, too, but that's again more cumbersome." (Tr. 23.)

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These comments by both counsel illustrate my concern that an arbitrator will be illequipped to fashion an adequate remedy. It will be recalled that the affected employees were not subjected to any disciplinary action that could be rescinded, nor did they experience any financial loss for which compensation could be awarded. The Board has described its traditional remedy, holding that, "The appropriate remedy for a Weingarten violation is an order requiring the employer to cease and desist from further such violations and to post a notice to that effect." Barnard College, 340 NLRB 934, 936 (2003). There is no indication that an arbitrator could devise a remedy that would meet the purposes underlying the Board's preferred measures. Beyond this, I have already noted that the Board and the Court of Appeals have tried other creative remedial solutions without success. In such circumstances, effectuation of the Act's purposes may well ultimately rest on the assertion of the contempt power. A charging party faced with this prospect ought not to be left to its own devices as suggested by the Employer's counsel. Effective enforcement of the Act in circumstances involving a recalcitrant party should include the assistance of the Board's enforcement personnel should further compliance proceedings become necessary. I conclude that arbitration is inappropriate because an arbitrator will not possess an effective remedial arsenal.

Finally, in studying the Board's rationale in *Collyer*, I return to language that seems to speak directly to this case. In expressing its belief in the value of deferral to arbitration, the Board described the appropriate circumstances as those where the action under review "is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege." *Collyer Insulated Wire*, supra, 192 NLRB at 841. In this case, the repeated refusal to inform the union representative of the subject matter of the investigative interviews was "patently erroneous." The Board could not have spoken more plainly in its holding in *Pacific Telephone & Telegraph*, supra, 262 NLRB at 1048, that on request made prior to a predisciplinary interview, "both the employee and his representative must have some indication as to the subject matter of the investigation." This is a clear rule. The Postal Service's conduct in this case represents an obvious and flagrant violation of it.³⁶ *Collyer's* rationale precludes deferral of such a patent violation to arbitration. In my view, forcing the injured party to resort to self-help in such a situation would be an abandonment of the Board's statutory duties. As a result, the Employer's renewed Motion for Summary Judgment must be denied.

Conclusions of Law

³⁶ It will be recalled that I have concluded that Melko's conduct was not simply the inadvertent error of a newly appointed supervisor. Rather, he refused repeated requests for information as to the subject matter of the interviews as part of a specific interrogation technique designed to pin down the subject being interviewed before the person was aware of the direct import of the initial questions. This is the very conduct the Board has chosen to prohibit as it is in derogation of the rights of bargaining unit members under the Act.

JD-37-06

1. By refusing to provide advance notification of the subject matter of investigative interviews involving Floyd Johnson and Denise Talmadge on the request of their union representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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- 2. By refusing to provide advance notification of the subject matter of the investigative interviews involving Johnson and Talmadge to their union representative, the Respondent deprived them of a meaningful opportunity to consult with that representative prior to their participation in those interviews, in violation of Section 8(a)(1) and Section 2(6) and (7) of the Act.
- 3. The Respondent's Motion for Summary Judgment seeking deferral of this case to the parties' grievance arbitration system should be denied.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Given the Respondent's history of *Weingarten* violations and other failures to provide relevant information necessary for the performance of the Union's protected collective-bargaining functions, I have given careful thought to the proper extent of the remedy to be imposed for the violations established in this case. The usual remedy is a cease-and-desist order and the posting of an appropriate notice to bargaining unit members. *Barnard College*, supra., at 936, fn. 12. Given this employer's history, the Board has not hesitated to impose additional broader relief in similar cases. See for example, *Postal Service*, 303 NLRB 463 (1991), enf. 969 F.2d 1064 (D.C. Cir. 1992) (nationwide posting remedy); *Postal Service*, 339 NLRB 1162 (2003) (broad order); *Postal Service*, 345 NLRB No. 25 (2005) (broad order); and *Postal Service*, 345 NLRB No. 26 (2005) (broad order).

At trial, I closely questioned counsel for the General Counsel regarding the precise relief being requested. Based on her responses, I observed that it appeared that the General Counsel was seeking "a standard cease and desist order, a standard notice, and that the posting be at Greentree [Station] and its substations." (Tr. 159.) She confirmed that this was the extent of the relief being sought. In her brief, she repeated the request for this specific relief. (GC Br. at 28—29.)

I have certainly considered the imposition of additional relief, given the history of this employer and my belief that the violations in this case were of a rather flagrant nature.³⁸ On balance, I conclude that it is better to defer to the General Counsel's judgment. I do so because this case is a piece of a much larger puzzle and the General Counsel is aware of, and bears significant responsibility for, addressing the nationwide situation. In her opposition to the Employer's Motion for Summary Judgment, counsel for the General Counsel noted that the

³⁷ Counsel for the General Counsel confirmed that the locations being sought for the notice posting are the station to which Supervisor Melko is assigned and all of the substations that are supervised from that locale, including the Crafton Finance Office. I agree that postings in these locations are well designed to effectuate the purposes of the Act.

³⁸ I am not bound by the General Counsel's requested remedies. See *WestPac Electric*, 321 NLRB 1322 (1996).

General Counsel will "monitor Respondent's conduct over the course of time and, if necessary, [] consider the initiation of contempt proceedings against Respondent within the context of the Board's continuing efforts to compel Respondent's compliance with its obligations." (Opposition to Motion for Summary Judgment, p. 4, GC Exh. 1(h).) I believe that the public interest will be best served by this unified approach to what appears to be a nationwide problem.

In sum, I concur in the remedial approach proposed by counsel for the General Counsel and I will recommend the issuance of the usual cease-and-desist order with notice posting at the Greentree Station and at all substations supervised from Greentree including, of course, the Crafton Finance Office.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁹

ORDER

The Respondent, United States Postal Service, Greentree, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) On request, failing and refusing to inform bargaining unit members and their union representatives of the subject matter that will be discussed during investigatory interviews that such bargaining unit members could reasonably believe may result in disciplinary action.
 - (b) On request, failing and refusing to provide bargaining unit members and their union representatives information as to the subject matter that will be discussed during investigatory interviews that the bargaining unit members could reasonably believe may result in disciplinary action at a time that does not afford those bargaining unit members a meaningful opportunity to consult with their union representatives before the interviews.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days after service by the Region, post at its Greentree, Pennsylvania station and all substations supervised from that station, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be

³⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5	posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility or facilities at any time since March 12, 2005.			
15	(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to			
20	Dated, Washington, D.C. September 1, 2006			
	Paul Buxbaum Administrative Law Judge			
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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT, on request, fail and refuse to inform bargaining unit members and their union representatives of the subject matter that will be discussed during investigatory interviews that bargaining unit members could reasonably believe may result in disciplinary action.

WE WILL NOT, on request, fail and refuse to provide bargaining unit members and their union representatives information as to the subject matter that will be discussed during investigatory interviews that bargaining unit members could reasonably believe may result in disciplinary action at a time that does not afford those bargaining unit members meaningful opportunity to consult with their union representatives before the interviews.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our bargaining unit employees in the exercise of the rights guaranteed to them by Federal labor law.

WE WILL, on request, inform bargaining unit members and their union representatives of the subject matter of any investigatory interviews that bargaining unit members could reasonably believe may result in disciplinary action, and WE WILL provide this information sufficiently in advance of the interviews to provide meaningful opportunity for consultation between the bargaining unit members and their union representatives.

		UNITED STATES POSTAL SERVICE, PITTSBURGH DISTRICT (Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

JD—37—06 Pittsburgh, PA

112 Washington Place
Suite 510
Pittsburgh, Pennsylvania 15219-3458
Hours: 8:30 a.m. to 5 p.m.
412-395-4400.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.